Dato' Hamzah Abdul Majid & Anor (for and on behalf of shareholders and members of Wembley Industries Holdings Bhd other than the defendants) v Wembley Industries Holdings Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D6-22-1364 OF 1997
KL REKHRAJ J
22 DECEMBER 1997

Civil Procedure *— Injunction — Ex parte injunction — Application to set aside — Non-disclosure of material facts — Whether grounds for setting aside — Whether court has discretion to grant an ex parte injunction notwithstanding O 29 r 2C of the Rules of the High Court 1980 — Rules of the High Court 1980 O 29 r 2C*

The plaintiffs were shareholders and directors of the first defendant. The plaintiffs claimed this to be a derivative action brought for the benefit of the first-named defendant by affirming that on or about 10 October 1997, they received a notification of an intended resolution to have them removed as directors of the first defendant at an extraordinary general meeting to be held on 22 December 1997. The plaintiffs filed an ex parte summons in chambers on 15 December 1997, supported by an urgent application under a certificate of urgency for the hearing which was duly heard on 16 December 1997 whereby an ex parte order was granted only because of the representation or submission of the plaintiffs' solicitors that the removal was against the rule of law under s 128 of the Companies Act 1965 ('the Act').

The defendants through their solicitors had put the plaintiffs on notice as early as 11 December 1997 that if the plaintiffs intended or desired to make any application to the court, the said solicitors had instructions to accept any service of process ('the notification'). The plaintiffs' solicitors on 18 December 1997 replied that they had no intention of applying for any interlocutory relief against the first defendant where in fact they had done so.

The ex parte order was only served at about 11.30pm on Saturday, 20 December 1997 when the meeting was fixed for Monday morning, thereby giving the defendants hardly any time to impeach or set aside the order. The defendants applied ex parte to set aside the ex parte injunctive order.

Held, setting aside the ex parte injunction:

(1) The plaintiffs' solicitors' delay in the service of the order upon the defendants and shrouding themselves in the cloak of secrecy for reasons best known to them was not only most unbecoming of a noble profession, but in their application for an ex parte urgent application, was shrouded with non-disclosure to the

court of the notification, where the court could have instead directed that the said solicitors, being on notification, could be made to be present at the hearing of the ex parte application. A

In such cases, non-disclosure of material and cogent relevant facts is itself a ground to set aside an ex parte injunction (see p 215F–H). B

(2) Had it not been for that misleading representation that the plaintiffs were directors representing a group of class shareholders, the court would not have granted the order as O 29 r 2C of the Rules of the High Court 1980 ('the RHC') prohibits the granting of such injunctions against corporations on ex parte application, the total effect of which was to stop the holding or progress of the meeting. C

In view of the subsequent admission by the defendants that the plaintiffs were not the representatives of class shareholders, the proceeding of the intended proposed resolution no longer became ultra vires s 128 of the Act but within the scope of O 29 r 2C, and accordingly the ex parte injunction was set aside with costs to the defendants (see p 216B, G). D

Obiter:

Notwithstanding the general limitations of O 29 r 2C of the RHC, the court has an unlimited and unfettered discretion to grant an interlocutory injunction on an ex parte application if it appears to the court that there are cogent reasons and if it is a case of sufficient urgency to maintain the status quo pending the hearing of inter partes application; more for the representation made in this case that was of a particular nature that the defendant's intended resolution in the removal of the plaintiffs as directors appeared to be ultra vires s 128 of the Act (see p 216C–D). E F

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemegang saham dan pengarah defendan pertama. Plaintif-plaintif mendakwa ini adalah tindakan terbitan yang dimulakan untuk manfaat defendan pertama dengan mengesahkan bahawa pada atau sekitar 10 Oktober 1997, mereka telah menerima pemberitahuan tentang suatu resolusi yang berhasrat menyingkirkan sebagai pengarah defendan pertama di mesyuarat agung luar biasa yang akan diadakan pada 22 Disember 1997. Plaintif-plaintif memfailkan satu saman dalam kamar ex parte pada 15 Disember 1997, yang disokong oleh suatu permohonan segera di bawah suatu sijil perakuan segera untuk pembicaraan yang didengar seperti yang sepatutnya pada 16 Disember 1997 di mana satu perintah ex parte dibenarkan hanya kerana representasi atau penghujahan peguamcara plaintif-plaintif bahawa penyingkiran adalah bertentangan dengan rukun undang-undang di bawah s 128 Akta Syarikat 1965 ('Akta tersebut'). G H I

A Defendan-defendan menerusi peguamcara mereka telah memberi notis kepada plaintif-plaintif sejak 11 Disember 1997 bahawa sekiranya mereka berhasrat atau ingin membuat sebarang permohonan kepada mahkamah, peguamcara tersebut mempunyai arahan supaya menerima apa-apa penyampaian proses ('pemberitahuan tersebut'). Peguamcara plaintif-plaintif pada 18 Disember 1997 menjawab bahawa mereka tidak berhasrat memohon apa-apa relief interlokutori terhadap defendan pertama sedangkan mereka telah berbuat demikian.

Perintah ex parte hanya disampaikan kira-kira pukul 11.30 malam pada hari Sabtu, 20 Disember 1997 walhal mesyuarat ditetapkan untuk pagi hari Isnin, justeru itu tidak memberikan masa yang cukup untuk defendan-defendan mencabar atau mengetepikan perintah. Defendan-defendan memohon secara ex parte untuk mengetepikan perintah injunksi ex parte.

Diputuskan, mengetepikan injunksi ex parte:

(1) Kelewatan peguamcara plaintif-plaintif dalam menyampaikan perintah ke atas defendan-defendan dan menyelubungi diri mereka dalam selubung rahsia untuk sebab-sebab yang paling diketahui mereka bukan sahaja tidak wajar dalam profesyen yang mulia, tetapi dalam permohonan mereka untuk satu permohonan segera ex parte, dilitupi dengan ketidakdedahan pemberitahuan tersebut kepada mahkamah, yang mana mahkamah boleh sebaliknya mengarahkan peguamcara tersebut, yang telah diberitahu, wajib hadir di pembicaraan permohonan ex parte.

Dalam kes sedemikian, ketidakdedahan fakta-fakta relevan yang material dan meyakinkan dengan sendirinya merupakan alasan untuk mengetepikan satu injunksi an ex parte (lihat ms 215F–H).

(2) Andainya representasi yang mengelabui bahawa plaintif-plaintif adalah pengarah yang mewakili sekumpulan pemegang saham kelas tidak dibuat, mahkamah tentu tidak akan memberikan perintah kerana A 29 k 2C Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') melarang injunksi begitu diberikan terhadap perbadanan atas permohonan ex parte, yang mana kesan keseluruhannya adalah untuk menahan perlangsungan atau perkembangan mesyuarat itu.

Memandangkan pengakuan kemudiannya oleh defendan-defendan bahawa plaintif-plaintif bukanlah wakil pemegang saham kelas, penerusan resolusi diniatkan yang dicadangkan tidak lagi menjadi ultra vires s 128 Akta tersebut tetapi dalam lingkungan A 29 k 2C, dan oleh itu injunksi ex parte diketepikan dengan kos kepada defendan-defendan (lihat ms 216B, G).

Obiter:

Tanpa mengira had umum A 29 k 2C KMT, mahkamah mempunyai budi bicara yang tidak terbatas dan tidak terbelenggu untuk

memberikan injunksi interlokutori pada permohonan ex parte andainya ia kelihatan kepada mahkamah bahawa terdapat alasan meyakinkan dan sekiranya ia adalah kes yang cukup penting bagi mengekalkan status quo sementara menunggu pembicaraan permohonan inter partes; lebih-lebih lagi untuk representasi yang dibuat dalam kes ini yang berciri khusus bahawa penyingkiran plaintif-plaintif sebagai pengarah yang diniatkan oleh defendan kelihatan ultra vires s 128 Akta tersebut (lihat ms 216C–D).]

Notes

For cases on injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

Case referred to

London City Agency (JCD) Ltd & Anor v Lee & Ors [1970] 1 Ch 597 (refd)

Legislation referred to

Companies Act 1965 s 128
Rules of the High Court 1980 O 29 r 2C

Deepak Sadasivan and *RG D'Cruz* (*Adnan Sundra & Low*) for the plaintiffs.

Loh Siew Cheang and *Robert Low* (*Cheang & Ariff*) for the first defendant.

Gopal Sreenevasan and *Charmaine Chow* (*Srivananthan*) for the second and ninth defendants.

KL Rekhraj J: The plaintiffs are the shareholders and directors of the first-named defendants collectively holding between themselves 26.4m; being 18.9% of the first defendant's issued and paid-up capital.

The plaintiffs claim this to be a derivative action brought for the benefit of the first-named defendant by affirming that on or about 10 October 1997 they received a notification of an intended resolution to have them removed as directors of the first defendant at an extraordinary general meeting to be held on 22 December 1997 at 10.30am. That this exercise or the act on the part of the defendants was not in the interest of the first defendant but was being proceeded for an improper and/or collateral purpose in the interest of the third, fourth and fifth-named defendants alleging, inter alia, breaches of fiduciary duties and fraud on the part of the defendants in their removal. The plaintiffs further alleged that they represented a particular class or category of shareholders in the first defendant company, and that s 128 of the Companies Act 1965 ('the Act') prevented their such removal as that section required directors or representatives of a particular class of shareholders to remain in office until a successor was appointed; whereas in the instant case, no such attempt had been made to first appoint a successor who can effectively protect the plaintiffs' shareholding; and claimed various prayers, one of which was an order restraining the second-named defendant from using its voting power

under the resolution to remove the plaintiffs as directors of the first defendant until the guarantee proceedings have been resolved.

The plaintiffs filed an ex parte summons in chambers on 15 December 1997 at 3.37pm supported by an urgent application under a certificate of urgency for the hearing; and pursuant thereto, the said summons in chambers was heard on 16 December 1997 at 10am and an ex parte order was granted only because of the representation or submission that the plaintiffs were class directors and their removal was against the rule of law under s 128 of the Act.

Having granted the order at 10.30am on 16 December 1997, I expected — because of the urgency expressed in the certificate in support — the plaintiffs' solicitors to immediately proceed to serve on the defendants the injunctive order but instead they waited for four days and only served at about 11.30pm on Saturday, 20 December 1997 knowing fully well that the meeting was fixed for Monday morning, thereby giving the defendants hardly any time to impeach or set aside the order.

It is also of special note here that the defendants had, as early as 11 December 1997 through their solicitors and with further reminder notification dated 17 December 1997, put the plaintiffs on notice that if the plaintiffs intended or desired to make any application to the court, the said solicitors had instructions to accept any service of process.

In answer to the said notification, the plaintiffs' solicitors on 18 December 1997 wrote a reply stating that they had no intention to apply for any interlocutory relief against the first defendant — totally failing even then to notify that they had in fact obtained such an order ex parte on 16 December 1997.

The plaintiffs' solicitors' conduct in the delay in service of the order upon the defendants and shrouding themselves in the cloak of secrecy for reasons best known to them is not only most unbecoming of a noble profession, but was also shrouded by non-disclosure to the court of that notification in their application for an ex parte urgent application, of the fact of such correspondences so that the court could have instead directed that the said solicitors, being on notification, could be made to be present at the hearing of the ex parte application.

Non-disclosure of material and cogent relevant facts is itself a ground to set aside an ex parte injunction in these circumstances.

The defendants' solicitors — notwithstanding the weekend — proceeded to fax to the plaintiffs' solicitors of their intention to appear before the judge on Monday morning at 9am to set aside the ex parte injuncted order and did appear to move the court.

The question that confronted the court was whether the court had jurisdiction to discharge an interlocutory ex parte injunction; and it was submitted by the defendants' solicitors — relying on the case of *London City Agency (JCD) Ltd & Anor v Lee & Ors* [1970] 1 Ch 597 — that there was no rule of practice to prevent the court from granting such an application ex parte in a case of sufficient urgency; more for the fact the plaintiffs' solicitors had failed to make a sufficient disclosure of the defendants'

solicitors' notification to accept service of any proceedings and in their deliberate misleading of the court on the statement that the plaintiffs were directors representing a group of class shareholders and as such could only be removed by those class shareholders.

Had it not been for that representation, the court would not have granted the prayer as O 29 r 2C of the Rules of the High Court 1980 ('the RHC') prohibits the granting of such injunctions against corporations on ex parte application, the total effect of which was to stop the holding or progress of the meetings.

To my mind, notwithstanding the general limitations of O 29 r 2C of the RHC, the court has an unlimited and unfettered discretion to grant an interlocutory injunction on an ex parte application if it appears to the court there are cogent reasons and if it is a case of sufficient urgency to maintain the status quo pending the hearing of inter partes application; more for the fact that the representation made in this case was of a particular nature that the defendants' intended resolution in the removal of the plaintiffs as directors appeared to be ultra vires s 128 of the Act.

As there was sufficient cogency in the hearing of the disposal of this ex parte application to set aside the ex parte injunctive order dated 16 December 1997, I took the liberty of contacting the plaintiffs' law firm to verify as to their receipt of any notification of this urgent application to set aside the ex parte order and was told that the solicitors concerned were away at a meeting.

However, within 15 minutes of that call, a Mr RG DC'ruz — who had appeared with Mr Deepak Sadasivan on 16 December 1997 — appeared in my chambers and confirmed the receipt of the faxes from the defendants' solicitors but took a preliminary point that the remedy of the defendants was instead to lodge an appeal and not by proceeding to set aside the ex parte order.

He also conceded to the submission of Mr Loh Siew Cheang, for the defendants, that the plaintiffs were not the representatives of class shareholders; but were representatives and directors in their own cause.

In view of this admission, the proceeding of the intended proposed resolution no longer became ultra vires s 128 of the Act but within the scope of O 29 r 2C, and I accordingly set aside the ex parte injunction with costs to the defendants.

Injunction set aside.

Reported by Eugene Lee Hong Whye